IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1288

JESSE HIGGINS, PAUL GOWER and WILLIAM GIPSON,
Petitioners,

vs.

RAY MARSHALL, Secretary of Labor, and OLD BEN COAL COMPANY, a division of SOHIO PETROLEUM CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioners Jesse Higgins, Paul Gower and William Gipson respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 25, 1978.

Opinions Below

The Opinion of the Court of Appeals is reported at 584 F.2d 1035, and is reproduced *infra* as Appendix A. Orders of the Court of Appeals denying rehearing and rehearing *en banc* are attached as Appendix B and Appendix C, respectively. The unreported Order of the United States District Court for the District of Columbia is set out as Appendix D. The unreported decision of the Department of Labor Administrative Law Judge is included as Appendix E.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976). The decision of the Court of Appeals was entered on July 25, 1978, and a timely petition for rehearing was denied on September 22, 1978. By Order of the Chief Justice dated December 15, 1978, the time for filing this petition was extended to February 19, 1979.

Question Presented

Can employers of black lung victims force them to suffer substantial wage losses if they exercise a federal statutory right to transfer from jobs exposing them to potentially fatal levels of respirable coal dust, despite a pay protection provision, 30 U.S.C. § 843(b)(3) (1976), designed by Congress "to insure" that participants in the transfer program will "suffer no loss in compensation"?

Statutes Involved

This action involves Sections 203(a) and (b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 843(a) & (b) (1976), which are set out *infra* as Appendix F.[1]

Statement of the Case

The Legislative Background

This action arises out of Congressional efforts to prevent the crippling and often deadly effects of coal workers' pneumoconiosis, commonly known as black

[1]The 1969 Act was renamed the Federal Mine Safety and Health Act of 1977 by § 101 of the Federal Mine Safety and Health Amendments Act of 1977, Pub.L. No. 95-164, 91 Stat. 1290 (Nov. 9, 1977). The 1977 Amendments Act made no changes in the language of § 843.

lung disease. In 1969, Congress formally recognized black lung as a separate clinical entity, and as a national health problem, in §§ 2 and 401 of the Federal Coal Mine Health and Safety Act of 1969 ("1969 Act"), 30 U.S.C. §§ 801 & 901, *as amended* (1976).[2] In Title IV of that Act, Congress created the program of compensation payments for black lung victims and their survivors which subsequently became the subject of this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (*"Turner Elkhorn"*).[3] 30 U.S.C. § 901 *et seq., as amended* (1976). At the same time, in order to reduce and hopefully eliminate future incidence of the dreaded disease, Congress placed limits on the amount of respirable coal dust permitted in the ambient air of the nation's mines, and also provided that miners who were developing black lung could transfer to positions in areas where respirable dust levels were safe even for them. 30 U.S.C. §§ 842 & 843(b)(1-2) (1976).

[2]Black lung disease "affects a high percentage of American coal miners with severe, and frequently crippling chronic respiratory impairment. The disease is caused by long-term inhalation of coal dust." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 & n.1 (1976).

It was originally estimated that approximately 100,000 active and retired coal miners were afflicted. *Id.* at 6 n.1. Based upon that estimate, the Chairman of the House Committee on Education and Labor observed that "the likelihood of death from black lung is twice as great as that of being killed in an underground coal mine accident." House Committee on Education and Labor, *Legislative History, Federal Coal Mine Health and Safety Act*, at 652 (Comm. Print 1970). In reality, by December 31, 1976, over 360,000 miners or survivors of miners had been found eligible for federal black lung compensation payments. Department of the Interior, *1976 Annual Report and Achievements, Mining Enforcement Safety Administration ("MESA 1976 Annual Report")*, at 24.

[3]By the end of 1976, black lung benefit payments were totalling approximately $950 million per year, and over $5 billion in benefits had been paid since the program's inception. *MESA 1976 Annual Report*, n.2 *supra*, at 24.

Like the restriction upon respirable dust, which this Court expressly noted in *Turner Elkhorn,* the transfer program recognized that "[r]emoving the miner from the source of coal dust has so far proved the only effective means of preventing the contraction of pneumoconiosis." *Turner Elkhorn, supra,* 428 U.S. at 7. A transferred miner is to remain in the new position "for such period or periods as may be necessary to prevent further development of [the] disease," and to receive "not less than the regular rate of pay received by him immediately prior to transfer." 30 U.S.C. § 843(b) (1976). The pay protection provision is designed "to insure" that miners will "suffer no loss in compensation" as a result of transferring. S.Rep. No. 91-411, at 49 (Sep. 17, 1969). Congress considered the transfer program "equal in importance to the dust control section for decreasing the incidence and development of pneumoconiosis." H.Rep. No. 91-563, at 20 (Oct. 13, 1969).

The present dispute concerns the term "rate" as it is used in 30 U.S.C. § 843(b)(3) (1976), when requiring that miners who transfer continue to receive at least the "regular *rate* of pay" received "immediately prior" to transfer. (emphasis added) The question is whether the "rate" referred to is the "classification rate" a miner received immediately prior to transfer (*e.g.,* the machine operators' rate), or is merely a miner's pre-transfer "dollar rate" (*e.g.,* $41.50/day). If payment of the pre-transfer "dollar rate" is all that is required, coal mine operators can lawfully penalize diseased miners who transfer, and can coerce them to rescind their decisions to transfer, by withholding contract wage increases to which they would have been entitled under applicable collective bargaining

agreements in their more hazardous pre-transfer job classifications. Also, by threatening to deny such increases, mine operators can lawfully discourage black lung victims from initially accepting transfers. Thus, as Judge Wright observed below, "[i]n today's inflationary economy the practical difference between these interpretations is that the classification rate interpretation will allow a stricken miner to transfer to a more healthy environment without fear of sacrificing ever larger percentages of his compensation, while the dollar rate interpretation will grant a miner a 'protection' so temporary that it may well be scheduled to disappear even before the current industry contract expires." 584 F.2d at 1040.

Statement of Facts

The three petitioners are Illinois coal miners who contracted black lung while employed by respondent Old Ben Coal Company ("Old Ben"). In early 1972, each exercised his § 843 transfer right. Jesse Higgins and Paul Gower went from the position of machine operator to that of tracklayer, while William Gipson, who has since retired due to disability, became a bottom laborer after having previously been a repairman. Immediately prior to their transfers, Higgins and Gower were, as machine operators, paid at the classification rate for that position, the dollar rate for which was $41.50 per day. Immediately prior to his transfer, Gipson as a repairman was paid at the classification rate for that position, the dollar rate for which was likewise $41.50 per day.

Old Ben continued to pay the petitioners $41.50 per day from the date of their transfers through November 11, 1972, when previously-scheduled salary in-

creases for machine operators and repairmen were to take effect under the applicable collective bargaining agreement. Since November 12, 1972, Old Ben has paid the petitioners at least $41.50 per day, but has refused, however, to pay them the increases to which they would have been entitled by contract in their old positions. In other words, Old Ben has refused to compensate them at their pre-transfer classification rates, although it has paid them at least their pre-transfer dollar rates. As a result, the petitioners have received substantially less compensation than they would have received if they had remained in their pre-transfer positions.[4]

When Old Ben's intentions became clear, the petitioners unsuccessfully sought relief from the Department of Labor pursuant to 30 U.S.C. § 938 (1976). In a decision dated March 31, 1977, a Labor Department Administrative Law Judge agreed that adoption of a "dollar rate" interpretation of § 843(b)(3) would "plac[e] afflicted miners in the dilemma of choosing between their wages and their health, thus chilling

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[4]See 584 F.2d at 1040 n.5. The differences between the petitioners' pre-transfer classification rates and the rates received can be summarized as follows:

Dates	Machine Operators' and Repairmen's Rate	Rates Received	Losses Due to Transfer
11/12/72 to 11/11/73	$45.75	$41.50	$4.25/day
11/12/73 to 11/11/74	$50.00	$42.75	$7.25/day
12/06/74 to 12/05/75	$55.00	$47.03	$7.97/day
12/06/75 to 12/05/76	$57.20	$48.91	$8.29/day
12/06/76 to 12/05/77	$58.92	$50.38	$8.54/day
03/27/78 to present	$73.32	$64.78	$8.54/day

any inclination to opt for their health." (p. 20a, *infra*) He further agreed that "in choosing between two wholly permissible readings of the Act, it would be [his] duty to accept the reading which fosters the health of miners." (p. 21a, *infra*) However, he read the "words" of § 843(b)(3) as "clearly" providing, and as making "a rather clear statement," that transferring black lung victims need only continue to receive the same number of dollars received prior to transfer. (p. 20a, *infra*)

The Law Judge's decision was affirmed on appeal by the District Court for the District of Columbia on August 18, 1977 (Hart, J.), and by a divided panel of the Court of Appeals for the District of Columbia on July 25, 1978 (Robb and Swygert, JJ.; Wright, C.J., dissenting). Rehearing was also denied, again with Judge Wright dissenting. The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1337 (1976).

The Court of Appeals majority based its decision on the "plain words" of § 843(b)(3), which were seen as "simple and straightforward: 'a transferring miner is not to receive less compensation than he would have received had he not transferred, that is, not less than the monetary amount he was receiving 'immediately prior to transfer'." 584 F.2d at 1037. It saw the only applicable rule of statutory construction as being that courts "must give the words of an enactment their ordinary meaning." *Id.* The majority found it unnecessary "to resort either to any additional rule of statutory construction or to the legislative history." *Id.*

In dissent, Judge Wright saw the majority's ultimate conclusion as contrary to "the majority's own explana-

tion of its position," since it claimed to be holding that "a transferring miner is not to receive less compensation than he would have received had he not transferred," while in reality it was allowing Old Ben to pay the petitioners substantially less than they would have received in their former positions. 584 F.2d at 1041. Judge Wright found the majority's "unsupported" and "bald assertions that regular rate of pay can mean only dollar rate of pay," which were the sole basis for its conclusion that the statutory language was "clear," to be "singularly unconvincing." *Id.* "The majority never addressed the undisputed fact that the term 'rate of pay' is commonly used in the sense of a classification rate or job rate, rather than dollar rate," as with, for example, GS rates. *Id.* Nor did the majority "answer the argument that a miner's classification rate of pay is clearly more 'regular' than his dollar rate," since dollar rates vary from year to year. *Id.* In Judge Wright's view, "[t]he classification rate interpretation—that if a miner transfers from being a machine operator to being a repairman his 'old rate of pay' is the rate for machine operators and his 'new rate' is the rate for repairmen—is not only a logical interpretation, but the only one that will not frustrate Congress' intent to prevent transfers from resulting in 'loss in compensation.' " 584 F.2d at 1042. Judge Wright saw the legislative history as "mandat[ing] the classification rate interpretation urged by the miners." 584 F.2d at 1041.

REASONS FOR GRANTING THE WRIT

I. The Question Presented by This Petition Is an Important Question of Federal Law Which Should Be Settled by This Court.

The question presented by this petition—whether the nation's black lung victims can be financially penalized for participating in the "job transfer" program created by Congress to prevent disabling and possibly fatal aggravation of their sickness—is of exceptional importance to the effectiveness of that program, and thus is an important question of federal law which should be decided by this Court. Congress considered the transfer program "equal in importance to the [respirable] dust control [program] for decreasing the incidence and development of pneumoconiosis." H.Rep. No. 91-563, at 20 (Oct. 13, 1969); *see Turner Elkhorn, supra,* 428 U.S. at 7-8. The answer to the question of whether participants in that program can be financially penalized is one which will significantly affect the number of afflicted miners who will exercise that right.

As indicated by the Administrative Law Judge below, allowing those who transfer to suffer wage losses places "afflicted miners in the dilemma of choosing between their wages and their health, thus chilling any inclination to opt for their health." (p. 20a, *infra*) That observation "is overwhelmingly confirmed by experience," for as noted in the Court of Appeals below, with "most" mine operators interpreting the statute as permitting losses in compensation, "less than 20 percent of the eligible miners have taken advantage of the option to transfer to more healthy job environ-

ments."[5] 585 F.2d at 1042 & n.14; see also 584 F.2d at 1040. The size of potential wage losses is large, as indicated here where the petitioners "were receiving 17% less compensation in 1977 than they would have been receiving had they chosen continued exposure to coal dust." 584 F.2d at 1040 n.5. The question is whether those who transfer must accept "a *significant* loss in compensation." 584 F.2d at 1040 (emphasis added).

Thousands of this nation's citizens are deeply affected by that question. Over 6,000 coal miners have already been certified as eligible for transfers (n.5, below), and the National Institute for Occupational Safety and Health ("NIOSH") has recently ordered another "round" of x-rays of all underground coal miners with at least three years' experience, to locate those who have become eligible since the two previous "rounds" of 1970-71 and 1973-75.[6] NIOSH has also drafted new transfer eligibility standards in light of increased medical knowledge, and estimates that in addition to however many miners would be found eligible during the upcoming "round" if current standards were followed, 2,200 more would be eligible under those now

[5]As of December 31, 1976, 5,830 black lung victims had been found eligible for transfers, but only 1,190 (20.4%) had exercised that right, and only 400 (6.9%) remained in their new positions. *MESA 1976 Annual Report*, n.2 *supra*, at 25. Unpublished figures provided to petitioners' counsel by Joseph Lamonica, Chief of the Health Division of the Labor Department's Mine Safety and Health Administration, indicate that 6,480 miners had been found eligible for transfers by December 31, 1977, that 1,215 (18.8%) had chosen to transfer, and that 320 (4.9%) remained in their post-transfer positions.

[6]"NIOSH Orders Another Mass X-Ray of Coal Miners," *McGraw-Hill Mine Regulation and Productivity Report*, at 6 (Aug. 11, 1978); see 43 Fed. Reg. 33713-20 (Aug. 1, 1978).

proposed.[7] And sadly, there will be yet more black lung victims in the future. To all of these people, the answer to the question here presented may literally be the difference between life or death.

Moreover, it is not just the afflicted miners who are affected. To their dependents, this action presents the question of whether their breadwinner must choose between significant and certain wage losses, and a risk of premature disability and painful death, with consequent personal loss and premature termination of earnings. To taxpayers, there is the question of whether it will be necessary to pay millions of dollars in black lung and other benefits because afflicted miners have had to choose between their wages and their health, have chosen their wages when faced with that "dilemma," and have lost their health and perhaps their lives as a result.[8] Indeed, the very human question here presented is whether federal law should or should not be interpreted in a manner, the inevitable result of which will be the painful death of hundreds if not thousands of coal miners, and the painful disablement of thousands more.

II. The Decision of the Court of Appeals Is Clearly Wrong.

The question presented by this petition not only is an important question of federal law, but also is an important question which was wrongly decided by the Court of Appeals' majority below. Congress simply

[7]"NIOSH," n.6, *supra;* 43 Fed. Reg. 33762-63 (Aug. 1, 1978).

[8]See nn. 2 & 3, *supra*, indicating that over 360,000 miners and survivors of miners had been found eligible for black lung benefits by December 31, 1976, and that such payments were then totalling approximately $950 million per year.

did not, in a landmark statute designed to preserve their health and safety, "condemn miners suffering from the dread black lung disease . . . to choose either continued exposure to levels of coal dust that will aggravate their affliction or a significant loss in compensation." 584 F.2d at 1039-40. Chief Judge Wright's dissenting opinion in the Court of Appeals, which is reported at 584 F.2d 1039-1044, clearly and completely indicates why the petitioners should have prevailed there. They would underscore three points made in Judge Wright's dissent.[9]

First, the decision of the panel majority is predicated upon an obviously erroneous finding that the language of § 843(b)(3) is "clear," supposedly because the term "rate of pay" has only one "ordinary meaning." 584 F.2d at 1037. As Judge Wright points out, "[t]he majority never addressed the undisputed fact that the term 'rate of pay' is commonly used in the sense of a classification or job rate, rather than dollar rate." 584 F.2d at 1041. Federal civil servants are commonly described as being paid at particular "GS rates," trainees in skilled crafts are commonly described as being paid the "apprentice rate," experienced plumbers are commonly described as being paid the "journeymen's rate," etc. Just as in other contexts, letters are mailed at the "first-class postage rate" and the like. In fact, as Judge Wright indicates, the majority used the term "rate" in the very sense of a "classification rate" right in its own opinion. 584 F.2d at 1041 n.9. The 1969 Act was drafted by the standing Congressional labor committees, which are particularly familiar with various uses of the term "rate."

[9]Some references in the dissent to S.Rep. No. 91-411 are misprinted in the West Reporter as references to "S.Rep.No. 94-411" and "S.Rep.No. 94-114." See the dissent's footnotes 4 and 11.

Second, the majority never addressed the fact that § 843(b)(3) does not just require payment of the pre-transfer "rate of pay," but of the "regular" pre-transfer rate. "[A] miner's classification rate of pay is clearly more 'regular' than his dollar rate." 584 F.2d at 1041. Dollar rates change annually, but miners retain the same classification rates year after year—particularly those miners most experienced and thus most likely to have contracted black lung.

Finally, the majority decision is obviously contrary to the 1969 Act's legislative history, which not only indicates that those who transfer are to "suffer no loss in compensation," but also declares that the 1969 Act is to "be construed liberally when improved health or safety to miners will result." S.Rep. 91-411 at 49 (Sep. 17, 1969); H.Rep. No. 91-761 at 63 (Dec. 16, 1969). Under the decision of the panel majority, miners afflicted with black lung will, directly contrary to Congressional intent, suffer a significant "loss in compensation" if they transfer. Thus, afflicted miners who must decide whether to accept or retain transfers are faced with a choice of either their wages or a healthful work environment. Such is hardly a "liberal" construction of § 843(b)(3) which will result in "improved health" to miners.

III. The Decision of the Court of Appeals Conflicts With a Fourth Circuit Decision, and Conflicts in Principle With Numerous Decisions of This and Other Courts.

Still another reason review should be granted is that the decision below conflicts with numerous decisions of other courts. Most importantly, the holding that black lung victims continue to receive the same

"pay rate" if they merely continue to receive the same number of dollars is directly contrary to the Fourth Circuit's holding in *Collins v. Mathews,* 547 F.2d 795, 799 (C.A. 4, 1976). There the Fourth Circuit held that a black lung victim who was paid the same number of dollars, and whose "earnings did not rise from year to year as did those of his co-workers," had indeed suffered a loss in compensation and was no longer receiving the same "wage rate." *Id.* Because "his earnings did not rise from year to year as did those of his co-workers," the Fourth Circuit held that the afflicted miner's "real wage rate reflect[ed] a decrease in earnings." *Id.*

To be sure, the "pay rate" dispute in *Collins* arose under the black lung benefits program rather than the black lung transfer program. But that only illustrates the fact that the instant question is significant even beyond the very important issue of whether the black lung transfer program is to be effective.[10] Moreover, the significance of the decisional conflict is heightened by its being between the District of Columbia and Fourth Circuits. Irrespective of the specific statutory context, appeals from most black lung "rate of pay" decisions can be made to courts in either of those two Circuits. Mine operators can appeal to the District of Columbia courts, as the heads of all relevant administrative agencies are located in the District of Columbia. At the same time, most aggrieved miners can appeal to Fourth Circuit courts because

[10]The "rate of pay" question is presented in the context of the transfer program in at least three other pending cases, *Mullins v. Andrus,* C.A.D.C. No. 77-1086, *Mullins v. Marshall,* D.D.C. Civ. No. 78-1779, and *Matala v. Marshall,* N.D.W.Va. Civ. No. 78-0035(W). Also, the parties in at least three additional disputes have agreed to abide by the ultimate result here.

those same agencies, and most of the nation's mine operators, are located in the Fourth Circuit states of West Virginia and Virginia. Thus, who will ultimately prevail in most such cases will be determined by who is fortunate enough *not* to prevail in agency proceedings.

See also virtually every other decision under the 1969 Act, indicating that contrary to the decision below, the 1969 Act's provisions are to be given a liberal construction in light of the broad Congressional purpose of protecting the health and safety of the nation's coal miners. *NICOA v. Kleppe,* 423 U.S. 388, 398-99 (1976); *UMWA v. Andrus,* — U.S. App. D.C. —, 581 F.2d 888, 894, *cert. denied,* 58 L.Ed.2d 321 (1978); *UMWA District 6 v. IBMA,* 183 U.S. App. D.C. 312, 316, 320, 321, 562 F.2d 1260, 1264, 1268, 1269 (1977); *Zeigler Coal Co. v. Kleppe,* 175 U.S. App. D.C. 371, 377-78, 381-82, 536 F.2d 398, 404-05, 408-09 (1976); *UMWA v. Kleppe,* 174 U.S. App. D.C. 328, 331, 532 F.2d 1403, 1406, *cert. denied,* 429 U.S. 858 (1976); *Munsey v. Morton,* 165 U.S. App. D.C. 379, 387-88, 507 F.2d 1202, 1210-11 (1974); *Phillips v. IBMA,* 163 U.S. App. D.C. 104, 114-15, 500 F.2d 772, 782-83 (1974), *cert. denied,* 420 U.S. 938 (1975); *Lucas Coal Co. v. Morton,* 522 F.2d 581, 587 (C.A. 3, 1975); *Rushton Mining Co. v. Morton,* 520 F.2d 716, 720 (C.A. 3, 1975); *Reliable Coal Corp. v. Morton,* 478 F.2d 257, 262 (C.A. 4, 1973); *Morris v. Mathews,* 557 F.2d 563, 570 (C.A. 6, 1977); *Old Ben Coal Corp. v. IBMA,* 523 F.2d 25, 33 (C.A. 7, 1975); *Freeman Coal Mining Corp. v. IBMA,* 504 F.2d 741, 744 (C.A. 7, 1974); *Bozwich v. Mathews,* 558 F.2d 475, 479 (C.A. 8, 1977); *Paluso v. Mathews,* 562 F.2d 33, 36 (C.A. 10, 1977).

Also contrast *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 179 (1967) (particularly when construing labor legislation, "legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question"); and *Masters Local 1740 v. NLRB*, 159 U.S. App. D.C. 11, 14, 486 F.2d 1271, 1274 (1973), *cert. denied*, 416 U.S. 956 (1974) ("labor legislation does not readily adapt itself to the 'plain meaning' school of jurisprudence").

Conclusion

For the foregoing reasons, a Writ of Certiorari should be granted, and the decision of the Court of Appeals reversed.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1829

JESSE HIGGINS, et al., APPELLANTS

v.

RAY MARSHALL, Sec. of Labor, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 77-0567)

Argued March 22, 1978

Decided July 25, 1978

Steven B. Jacobson, for appellants.

John S. Lopatto, III, Attorney, Department of Labor, for appellee, Secretary of Labor.

Mark M. Pierce, of the bar of the Supreme Court of Wisconsin, *pro hac vice*, by special leave of Court, with whom *William Roundtree* was on the brief, for appellee, Old Ben Coal Company.

Before: WRIGHT, *Chief Judge*, SWYGERT,* *United States Circuit Judge* for the Seventh Circuit, and ROBB, *Circuit Judge*

Opinion for the Court filed by *Circuit Judge* SWYGERT.

Dissenting opinion filed by *Chief Judge* WRIGHT.

SWYGERT, *Circuit Judge*: The issue in this appeal is one of statutory interpretation. Pursuant to section 203 of Title II of the Federal Coal Mines Health and Safety Act of 1969 (the 1969 Act), "[a]ny miner [who contracts pneumoconiosis and opts to transfer to a position in a less dusty area of the mine] shall receive compensation for such work at not less than the *regular rate of pay* received by him immediately prior to his transfer." 30 U.S.C. § 843(b)(3) (emphasis added). What the "regular rate of pay" means is the question we must decide.

I

During 1972 each of the plaintiffs-appellants, three coal miners for Old Ben Coal Company (Old Ben) in Franklin County, Illinois, had chest examinations which showed evidence of the development of pneumoconiosis or black lung disease. Each man thereby became eligible for transfer to another position in a less dusty area of the mine to prevent further development of the disease. 30 U.S.C. § 843(b)(1). Plaintiffs Jesse Higgins and Paul Gower transferred from positions as machine operators to positions as tracklayers; plaintiff William Gipson transferred from a position as a repairman to one as a bottom laborer. Before the transfer, each man received $41.50 a day; after the transfer each man continued to receive $41.50 a day although the other miners in the new positions received only $37.25 a day.

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

On November 12, 1972 the situation changed. Pursuant to a new wage agreement, as of that date the daily wage rates for the positions vacated by plaintiffs were raised to $45.75 while the rates for the new positions were raised to $40.00. The plaintiffs continued to receive $41.50 a day, the old rate applicable to their former positions. This meant that the miners were receiving $4.25 less each day than they would have received had they never transferred from their previous positions. They were, however, receiving $1.50 more each day than other miners in the new positions. One year later, when $50.00 became the daily rate for the vacated positions and $42.75 for the new ones, the plaintiffs began to receive $42.75 and have continued to receive the annual increases awarded to miners in their new positions.[1] The plaintiffs unsuccessfully requested payment from Old Ben at the rate for their vacated positions.

[1] The applicable daily wage rate and the amounts actually paid to the miners are summarized as follows:

Dates	Machine Operator/ Repairman	Tracklayer/ Bottom Laborer	Amount Paid	Difference
Transfer to 11/11/72	$41.50	$37.25	$41.50	——
11/12/72 to 11/11/73	$45.75	$40.00	$41.50	$4.25/day
11/12/73 to 11/11/74	$50.00	$42.75	$42.75	$7.25/day
12/06/74 to 12/05/75	$55.00	$47.03	$47.03	$7.97/day
12/06/75 to 12/05/76	$57.20	$48.91	$48.91	$8.29/day
12/06/76 to 12/05/77	$58.92	$50.38	$50.38	$8.54/day

In a complaint first filed with the Department of the Interior [2] and then refiled with the Department of Labor, the plaintiffs alleged that Old Ben was discriminating against them in violation of 30 U.S.C. §§ 820(b) and 938(a) by not paying the "Standard Daily Wage Rate" for their pre-transfer positions as required under section 843(b)(3), that is, by not granting them the pay increases they would have received had they not transferred. A Department of Labor administrative law judge denied relief, holding that Old Ben had not violated section 843(b)(3). The judge rejected the expansive construction suggested by the plaintiffs and instead read the section as a "rather clear statement that a miner who chooses to transfer shall not be paid at a lesser rate (dollars per hour or day or ton) than he was receiving *immediately* prior to his transfer." (emphasis in the order) He found that the term "immediately prior" fixes the minimum hourly or daily rate which may be paid, not the classification rate. The judge noted that although the more liberal construction would probably encourage more transfers to cleaner environments by not forcing the afflicted miners to choose between wages and health, the absence of ambiguity in the statute's language prevented such a construction. The administrative law judge's order was affirmed in an unreported decision by the district court.

II

The question is whether the language of section 843(b)(3) (that a miner who chooses to transfer for health reasons may not be compensated at less than the "regular rate of pay" received immediately prior to transfer)

[2] On July 16, 1974 the Interior Board of Mine Operations Appeals denied the miners relief on jurisdictional grounds. An appeal from that decision was dismissed by this court as untimely filed. *Higgins* v. *Andrus*, No. 77-1363 (D.C. Cir., June 20, 1977).

means that in addition to not suffering an immediate pay cut, the transferring miner also may not be denied the future pay increments he would have received had he remained in his previous position.

Plaintiffs contend that the term "regular rate of pay" was misinterpreted by both the administrative law judge and the district court. They argue that one who exercises his option to transfer to a cleaner environment must continue to receive at lease the wages he would have received had he not transferred, and that the rate of pay is tied to the position rather than to a dollar amount received immediately prior to transfer. The plaintiffs suggest that the term "rate of pay" was misinterpreted because too much importance was attached to the use of the word "immediately" in the statute, and, instead, more attention should have been given to the word "regular." Accordingly, the term "regular rate" would then have been defined as the "classification" rate because a miner would have been receiving the same "classification rate" more regularly than the same "dollar rate."

In the alternative, the plaintiffs argue that the term "regular rate of pay" is latently if not patently ambiguous, and therefore this court must reconstruct how Congress would have decided the issue had it been specifically addressed, citing Judge Leventhal's concurrence in *District 6, UMWA* v. *IBMA*, —— U.S. App. D.C. ——, —— F.2d ——, No. 75-1704 (D.C. Cir., Aug. 9, 1977). They suggest that the legislative history provides such firm evidence in support of their more liberal construction, that this court would be obliged to adopt that construction even if the "plain words" of the statute could support only the more limited interpretation. As their final argument the plaintiffs contend that a canon of statutory construction requires a liberal interpretation of remedial legislation.

Although the two defendants take slightly different approaches in response to the plaintiffs' arguments, they

both respond that none of the arguments is viable mainly because the language of the statute is plain and therefore requires no judicial interpretation. We agree.

When faced with a question of statutory interpretation, a court first must look to the language of the act itself. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). In the absence of persuasive reasons to the contrary, we must give the words of an enactment their ordinary meaning. *Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459, 465 (1968). With these principles in mind, we find that the language of section 843(b)(3) is simple and straight-forward: a transferring miner is not to receive less compensation than he would have received had he not transferred, that is, not less than the monetary amount he was receiving "immediately prior to transfer." We therefore find it unnecessary to resort either to any additional rule of statutory construction or to the legislative history.

We find no merit in the plaintiffs' contention that the term "rate of pay" is latently if not patently ambiguous. There is no ambiguity and therefore we do not need to reconstruct how Congress would have decided the specific question presented here. The legislative history of the section, albeit sparse, indicates congressional concern for protecting the transferring miner from loss in compensation.[3] There is nothing to indicate that Congress meant to tie the compensation protection to the pay rate received by miners in the pre-transfer classification. To so hold would be to distort the clear meaning of the words of the statute. When the meaning is clear, and the enactment is within the constitutional authority of Congress, the "sole function of the courts is to enforce it according to its terms," *Caminetti* v. *United States*, 242 U.S. at 485.

[3] H.R. Legis. Hist. at 49; S. Legis. Hist. at 175.

Our reading of the statute is consistent with the basic purpose of the Act; by not having to take a pay cut upon transfer to a position which would ordinarily pay less, the miner is more likely to transfer to protect his health than he would be otherwise.

Although we did not need to resort to legislative history in light of our holding that the meaning of the phrase "regular rate of pay" is clear and unambiguous, *March* v. *United States*, 506 F.2d 1306, 1313 (D.C. Cir. 1974), our research failed to uncover any conflicting history. *Boston Sand and Gravel Company* v. *United States*, 278 U.S. 41, 48 (1928). We do note one additional argument made by the Secretary of Labor which concerns the legislative history of the amendments to the 1969 Act. On November 9, 1977 Congress enacted the Federal Mine Safety and Health Amendments Act of 1977 (the 1977 Act), amending the 1969 Act by modifying and extending coverage under Titles I and V to all types of mining. Titles II, III, and IV remain basically unchanged and continue to apply exclusively to the coal mining industry.

The Secretary argues, with persuasion, that because Congress specifically considered the question of whether to adopt the compensation protection provision of section 843(b)(3) when amending Title I, the legislative history of the 1977 Act may be viewed as an indication of how Congress had intended the pay protection provision in Title II to operate. As that legislative history shows, the House version of the bill included no such provision under Title I. The Senate version, on the other hand, incorporated pay protection in Title I as follows:

> Any miner transferred as a result of such exposure [to a hazard covered by a mandatory standard promulgated under this Act] shall continue to receive compensation for such work at not less than the regu-

lar rate of pay for miners *in the classification such miner held immediately prior to his transfer.*

S. 717, 95th Cong., 1st Sess. § 201[102(a)(6)] (1977) (emphasis added). This language clearly would have required transferred miners to be compensated indefinitely as they would have been had they never transferred. Neither the House nor Senate version altered the existing language of section 843(b)(3) of Title II.[4]

After passage of the bills, a conference committee met to resolve the differences. The compensation protection provision of Title I, as finally enacted by both houses, includes the following language:

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[4] It is also worth noting that the very problem we address here was drawn to the attention of Congress when the House and Senate subcommittees were considering the amendments to the 1969 Act. The following is an excerpt from the statement submitted by Arnold Miller, President of the United Mine Workers, to both subcommittees:

> *Black Lung Transfer Program.* Section 203(b) of the 1969 Coal Act gives miners who have developed simple pneumoconiosis a right to transfer to positions in less dusty areas of mines in order to prevent the advance of their disease, without having to suffer any loss in compensation. However, some mine operators have refused to pay transferees wage increases they would have received if they had remained in their former positions, and administrative relief from this practice has so far been denied. As a result, less than one-fourth of those entitled to transfer have done so.
>
> To solve this problem once and for all, a new section 202(f) should be added to the bill after line 12 on page 66, as follows:
>
> > (e) Section 203(b)(3) [843(b)(3)] of such Act is amended by striking out "received by him" and inserting in lieu thereof "being paid to miners performing the type of work such miner was performing."

Congress did not adopt the proposed change.

> Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for such miners in the classification such miner held immediately prior to his transfer. *In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.*

30 U.S.C. § 811(a)(7) (emphasis added). Of particular note is the explanation included in the Conference Report:

> The conference substitute conforms to the Senate bill, except that it limits the scope of the provision which guarantees that a miner who is reassigned to a different job classification will suffer no reduction in compensation if such reassignment is the result of a medical examination indicating that such miner may suffer material impairment of health or functional capacity by further exposure to a toxic substance or harmful physical agent. After reassignment, however, such miner will be entitled only to the same dollar rate increases applicable to his new job classification. The conferees intend this provision to encourage miner participation in medical examination programs by insuring that miners who do participate in such programs shall suffer no immediate financial disadvantage if a medical examination results in a job reassignment.

H. Conf. Report No. 95-655, *reprinted in* [1977] U.S. Code Cong. & Ad. News 3490.

It is clear that non-coal miners transferred under section 811(a)(7) of the 1977 Act because of exposure to toxic substances are not to suffer any immediate decrease in pay, but it is also manifest that the pay protection is not linked forever to their pre-transfer job classification. Of course, had Congress specifically addressed the issue of the intent of section 843(b)(3) of the 1969 Act, its declaration would clearly have been entitled to great

weight. But even in the absence of such express consideration, subsequent enactments are entitled to some weight. At the very least, the legislative history surrounding the enactment of section 811(a)(7) is consonant with our holding.

The judgment of the district court is affirmed.

WRIGHT, *Chief Judge, dissenting*: In Section 2 of the Federal Coal Mine Health and Safety Act of 1969 (FCMHSA or Act) Congress expressly declared that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner." [1] Even industry spokesmen testified in the hearings on the 1969 legislation that they did "not believe profits should be put ahead of the health and safety of mineworkers." [2] To assure that the Act's purpose would not be frustrated by subsequent judicial construction, the Conference Report specifically stated that "[i]n adopting these provisions, the managers intend that the act be construed liberally when improved health or safety to miners will result." [3]

The majority today turns its back on Congress' primary concern with the health of miners and adopts an interpretation of the Act that condemns miners suffering from the dread black lung disease (pneumoconiosis) [4] to

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[1] Federal Coal Mine Health and Safety Act of 1969, § 2(a), 30 U.S.C. § 801(a) (1970).

[2] S. Rep. No. 91-411, 91st Cong., 1st Sess. 1 (1969) (*quoting* Stephen F. Dunn, President of the National Coal Association).

[3] H.R. Rep. No. 91-761, 91st Cong., 1st Sess. 63 (1969).

[4] The Surgeon General has described this disease as follows:

> Coal miners' pneumoconiosis is a chronic chest disease, caused by the accumulation of fine coal dust particles in the human lung. In its advanced form, it leads to severe disability and premature death.
>
> * * * * *
>
> Physicians classify coal miners' pneumoconiosis as simple or complicated, depending on the degree of evidence in the X-ray picture. * * *
>
> * * * [S]imple pneumoconiosis seldom produces significant ventilatory impairment, but, the pinpoint type may

choose either continued exposure to levels of coal dust that will aggravate their affliction or a significant loss in compensation.[5] The majority explains its action by claiming that the statutory provision in question is "clear and unambiguous." Majority at 7. Since I find an interpretation of the statute that would fulfill congressional in-

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reduce the diffusing capacity, the ability to transfer oxygen from the lung into the blood.

Complicated penumoconiosis [*sic*] [which] results if exposure to coal dust continues after the victim contracts simple pneumoconiosis] is a more serious disease. The patient incurs progressive massive fibrosis as a complex reaction to dust and other factors, which may include tuberculosis and other infections. The disease in this form usually produces marked pulmonary impairment and considerable respiratory disability. Such respiratory disability severely limits the physical capabilities of the individual, can induce death by cardiac failure, and may contribute to other causes of death.

* * * * *

There is no specific therapy for pneumoconiosis in either its simple or complicated form.

S. Rep. No. 94-411, *supra* note 2, at 7-8. The Senate Report also notes that the disease is "irreversible once contracted." *Id.* at 7.

[5] The significance of the loss in compensation is evident from the facts of this case. As the figures reproduced in note 2 of the majority opinion indicate, appellant miners were receiving 17% less compensation in 1977 than they would have been receiving had they chosen continued exposure to coal dust. Those figures also demonstrate that the loss in compensation has steadily *increased* over time, both absolutely and as a percentage of wages paid. The most convincing evidence of the significance of the loss in compensation, however, is the fact that most eligible miners have chosen continued exposure to coal dust rather than accept the lower income that they fear will result from a voluntary transfer. *See* text and notes at notes 7 & 14 *infra*.

tent, rather than frustrate it, equally compatible with the statutory language, I must respectfully dissent.

This case turns on language in Section 843(b) of the FCMHSA, a provision designed to allow miners who have been diagnosed as suffering from black lung disease to transfer at their option to mining jobs in which they will be exposed to lower amounts of the coal dust that causes and aggravates their crippling and eventually fatal disease. Realizing that miners might hesitate to transfer voluntarily to jobs with lower wages, Congress provided in Section 843(b)(3) that "[a]ny miner so transferred shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer." 30 U.S.C. § 843(b)(3) (1970).

The question in this case is whether the words "regular rate of pay" should be interpreted to mean *dollar* rate or *classification* (job, contract) rate—*i.e.*, whether transferred miners should continue to receive compensation at the same dollar rate of pay (*e.g.*, $40/day) or rather at the same classification rate of pay (*e.g.*, the machine operator's rate, the GS-2 rate) that they received before being transferred. In today's inflationary economy the practical difference between these interpretations is that the classification rate interpretation will allow a stricken miner to transfer to a more healthy environment without fear of sacrificing ever larger percentages of his compensation, while the dollar rate interpretation will grant the miner a "protection" so temporary that it may well be scheduled to disappear even before the current industry contract expires.[6] The impact of this difference is all too

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[6] In this very case appellant miners transferred in 1972, and the "protection" offered them by the mine owners' "dollar rate" interpretation was cancelled out by November 1973 as a result of wage increases that had been agreed to before their transfer, under the National Bituminous Wage Agreement of 1971. *See* JA 7.

The dollar rate interpretation would lead to equally anomal-

clear from statistics on transfers since the FCMHSA was passed. Most employers have, like Old Ben Coal Company, adopted the dollar rate interpretation. As a result, only a fraction of the miners eligible for transfers have taken advantage of the remedy Congress provided.[7]

The Administrative Law Judge (ALJ) below recognized that the dollar rate interpretation urged by the mine owners would place "afflicted miners in the dilemma of choosing between their wages and their health, thus chilling any inclination to opt for their health." JA 9. He also agreed with appellants that "in choosing between two wholly permissible readings of the Act, it would be my duty to accept that reading which fosters the health of miners." *Id.* Nevertheless, he concluded that the "literal language of the Act" was not "open" to the classification rate interpretation. *Id.* at 10. He focused particularly on the word "immediately," asserting that "[i]ts presence can be explained, in my judgment, only as a reference point from which to ascertain the lowest wage rate [a transferred miner] may lawfully be paid." *Id.* at 9. This reliance on the word "immediately" seems misguided: such a "reference point" is equally necessary under either the classification rate or the dollar rate interpretation.[8]

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ous results if the wages for all positions in the coal mines were dropping, rather than rising. In such a situation the dollar rate interpretation would require that miners be paid *more* if they transfer than if they stay in their former jobs.

[7] *Federal Mine Safety and Health Amendments Act of 1977*, Hearings Before the Subcomm. on Labor of the Comm. on Human Resources, U.S. Senate, 95th Cong., 1st Sess. 162 (1977) (prepared statement of Arnold R. Miller). *See also* note 14 *infra*.

[8] When the Senate wrote an analogous, but less ambiguous, provision in 1977 which clearly specified protection of compensation based on a miner's "classification rate," it again used the words "immediately prior to his transfer" as a reference point. *See* text and note at note 18 *infra*.

Both the District Court and the majority sustain the ALJ's conclusion that the statute is unambiguous. While both courts wisely avoid relying on the word "immediately," neither supports its conclusion that the language is clear with anything but bald assertions that "regular rate of pay" can mean only *dollar* rate of pay. I find these unsupported assertions singularly unconvincing. The majority never addresses the undisputed fact that the term "rate of pay" is commonly used in the sense of classification rate or job rate, rather than dollar rate.[9] Nor does it answer the argument that a miner's classification rate of pay is clearly more "regular" than his dollar rate. The majority apparently hopes to eliminate the statute's obvious ambiguity by asserting repeatedly that it does not exist. Despite these efforts, however, even the majority's own explanation of its position falls victim to the ambiguity it stubbornly refuses to acknowledge. The majority first describes the "simple and straightforward" meaning of the statute as follows: "a transferring miner is not to receive less compensation than he would have received had he not transferred * * *." Majority at 6. This requirement would be satisfied by the classification rate interpretation, but it is clearly not satisfied by the interpretation adopted by the majority. Then, in the same sentence, the majority "clarifies" this "simple and straightforward" meaning by adding the words "that is, not less

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[9] The term "rate" is used in the sense of classification rate in both the brief of appellee Old Ben Coal Co. at p. 15 and the majority's opinion, *e.g.*, at pp. 3-4. Appellee Secretary of Labor (brief at 7) urges the court to consider the meaning of the terms "regular rate of pay" in another section of the Act, which guarantees miners full compensation at their regular rates of pay if a mine is closed for safety violations. 30 U.S.C.A. § 821 (1978 pocket part). As appellants point out, however, the classification rate interpretation fits in § 821 as well as, if not better than, the dollar rate interpretation. Appellants' reply brief at 22-25.

than the monetary amount he was receiving 'immediately prior to transfer.' " *Id.*

Once such obvious verbal manipulation is put aside and the ambiguity on the face of the statute is honestly acknowledged, a court must turn to the legislative history for assistance in choosing the correct interpretation. As the ALJ was quick to recognize,[10] the legislative history in this case mandates the classification rate interpretation urged by the miners. The Senate Report summarized the intent of Section 843(b)(3) as follows:

> In order to insure that miners who are afflicted with pneumoconiosis suffer no loss in compensation, the committee has included a provision entitling a miner who is transferred to another job pursuant to this subsection to receive his old or new rate of pay, whichever is greater.[11]

The classification rate interpretation—that if a miner transfers from being a machine operator to being a repairman his "old rate of pay" is the rate for machine operators and his "new rate" is the rate for repairmen—is not only a logical interpretation, but the only one that will not frustrate Congress' intent to prevent transfers from resulting in "loss in compensation."

Even more conclusive is Congress' express direction that "the Act be construed liberally when improved health or safety to miners will result." [12] As this court has

[10] *See* p. 4 *supra*; JA 9.

[11] S. Rep. No. 94-114, *supra* note 2, at 49. This same language was used in the debates following the Conference to describe the legislation as it emerged from the Conference Committee. *See* STAFF OF SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 1607 (Committee Print 1975).

[12] H.R. Rep. No. 91-761, *supra* note 3, at 63.

recently stated, "Should a conflict develop between a statutory interpretation that would promote safety [or health] and an interpretation that would serve another purpose at a possible compromise to safety [or health], the first should be preferred." *District 6, UMW v. U.S. Dep't of Interior Board of Mine Operations Appeals*, 562 F.2d 1260, 1265 (D.C. Cir. 1977). The health consequences of the alternative interpretations urged by the parties in this case are undisputed. The ALJ's observation that the dollar rate interpretation would "chill" the miners' "inclination to opt for their health" [13] is overwhelmingly confirmed by experience. With most mine owners following the dollar rate interpretation, less than 20 percent of the eligible miners have taken advantage of the option to transfer to more healthy job environments.[14] The majority's decision today can only further reduce the incentive to opt for health: it undermines the compensation protection Congress sought to provide and assures that Congress' intent to arrest the development of already diagnosed black lung disease will continue to be frustrated.

In an attempt to buttress its reliance on the allegedly "clear" words of the statute the majority makes some reference to the legislative history of the Federal Mine Safety and Health Amendments of 1977. These amendments extended the enforcement provisions set out in

[13] *See* p. 4 *supra*; JA 9.

[14] The most recent figures cited by the parties indicate that between the effective date of the 1969 Act, June 30, 1970, and December 31, 1975, 5,815 miners had been found eligible for black lung transfers. Yet only 1,150 (19.6%) of these eligible miners had exercised their rights to transfer and only 435 (7.5%) were still in their new positions at the end of 1975. DEPARTMENT OF THE INTERIOR, MINING ENFORCEMENT SAFETY ADMINISTRATION, 1975 ANNUAL REPORT AND ACHIEVEMENTS Part I at 11 (1976), cited in appellants' brief at 12.

Titles I and V of the FCMHSA to other (non-coal) parts of the mining industry and shifted responsibility for enforcing the entire Act from the Interior Department to the Labor Department.[15] As the majority points out, the 1977 amendments did not attempt to address in any detail problems that had arisen under Titles II (which contains Section 843(b)(3)), III, and IV of the Act, which remained applicable only to coal mining.[16] Thus, although the United Mine Workers did comment on the problem of the ambiguity in Section 843(b)(3) in hearings on the 1977 legislation in the hope that Congress would resolve the issue, Congress' failure to address this issue, which was peripheral to its central concerns, is certainly not an endorsement of either position in this case.[17]

The majority also mentions the transfer provision enacted in the 1977 amendments to cover non-coal miners—a provision analogous to Section 843(b)(3). Insofar as the legislative history of this provision is relevant at all to the case before us, however, it seems to support appellants rather than the majority. As the majority notes, the 1977 transfer provision as originally passed by the Senate contained language specifically providing that transferred miners were to continue to be paid at their old *classification* rate:

> Any miner transferred as a result of such exposure shall continue to receive compensation for such work at not less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer.

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[15] *See* H.R. Rep. No. 95-655, 95th Cong., 1st Sess. 37 (1977).

[16] *Id.*; majority op. at 7.

[17] At the time the UMW made its presentation to Congress there was apparently no definitive administrative interpretation on this point. *See* appellants' reply brief at 37.

S. 717, 95th Cong., 1st Sess. § 201 (1977). The Senate thus adopted new, clearer language rather than repeating the ambiguous language of Section 843(b)(3). The Senate Report pointed out specifically that the "'regular rate' is to include any subsequent salary increase received by miners in the classification such miners held immediately prior to transfer." S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977).

The House bill, on the other hand, contained no transfer provision, and the House conferees were apparently unwilling to extend to non-coal miners the full protection provided by the Senate bill. The compromise version of the transfer provision that emerged from the Conference Committee therefore added a sentence expressly limiting the protection offered by the Senate bill: any *increases* in a transferred miner's wages were to be governed by his new, rather than his old, classification.[18]

Both the language of the 1977 transfer provision as eventually enacted and the Conference Report reflect Congress' awareness that it was placing a special limit on the protection offered to transferring miners. Rather than adopting the Senate version, which it described as providing for "no reduction in compensation," the Conference adopted a version it described as providing that transferred miners would "suffer no *immediate* disadvantage." H.R. Rep. No. 95-655, 95th Cong., 1st Sess. 42 (1977)

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[18] Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. *In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based under the new work classification.*

* * *

30 U.S.C.A. § 811(a)(7) (1978 pocket part) (emphasis added).

(emphasis added). This explicit recognition of the limitation on the protection provided in the 1977 statute contrasts sharply with the ambiguous wording of Section 843(b)(3) and the unqualified statement in its legislative history that transferred coal miners were to suffer "no loss in compensation." [19]

Although the absence of specific limitations on the wage protection offered by Section 843(b)(3) can be used to support appellants' position when viewed in comparison with the analogous 1977 transfer provision, arguments for either side based on the 1977 legislation suffer serious limitations: eight years had passed and a different Congress was involved, the 1977 transfer provision covers different miners with different afflictions [20] and is mandatory rather than voluntary, and, perhaps most important, the 1977 provision is clearly a compromise which lies between the positions urged by appellants and appellees and which no one here urges as a possible interpretation of the language of Section 843(b)(3).

Under these circumstances, the most fruitful approach to this case is to focus on the words of Section 843(b)(3), recognize their ambiguity, and interpret them according to the clear intent and explicit directions of Congress. Since the majority cuts its inquiry short by clinging to

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[19] *See* text and note at note 11 *supra*.

[20] The 1977 amendments require transfers "where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by [a] mandatory standard * * *." Section 101(a)(7), 30 U.S.C.A. § 811(a)(7). Rather than dealing with a specific disease like black lung and with figures that could be accurately approximated, Congress in 1977 was legislating with respect to a much more vaguely defined and potentially expansive category of disabilities. This difference might arguably have been responsible for the legislature's reluctance to grant full wage protection.

the claim that the Congress, depite its expressed intentions, enacted a provision that "clearly and unambiguously" offers only a phantom protection to the mining industry's "most precious resource" and puts profits ahead of the health and safety of mine workers, I respectfully dissent.

APPENDIX B

United States Court of Appeals
for the District of Columbia Circuit

No. 77-1829
September Term, 1977

Jesse Higgins, et al, Appellants, v. Ray Marshall Sec. of Labor, et al. Civil Action #77-0567.

BEFORE: Wright, Chief Judge; Swygert*, U.S. Circuit Judge for the U.S. Court of Appeals Seventh Circuit, and Robb, Circuit Judge.

Order

Upon consideration of the petition for rehearing filed by appellants Jesse Higgins, et al, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

Per Curiam
For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Chief Judge Wright would grant appellants' petition for rehearing.

Filed: Sep 22, 1978

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*Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

APPENDIX C

United States Court of Appeals
for the District of Columbia Circuit

No. 77-1829
September Term, 1977

Jesse Higgins, et al., Appellants, v. Ray Marshall, Sec. of Labor, et al. Civil Action #77-0567.

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

Order

The suggestion for rehearing *en banc* filed by appellants Jesse Higgins, et al, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Filed: Sep 22, 1978

APPENDIX D

United States District Court
for the District of Columbia

Jesse Higgins, et al., Plaintiffs, v. Ray Marshall, Secretary of Labor, and Old Ben Coal Corporation, Defendants. Civil Action No. 77-0567.

Order Granting and Denying Motions for Summary Judgment and Motions to Dismiss

Upon consideration of plaintiffs' Motion for Summary Judgment and of the respective defendants' Motions for Summary Judgment and to Dismiss and after oral argument thereon in open Court, and it appearing to the Court that there is no dispute of material fact, and that the resolution of this matter is dependent solely on the interpretation of 30 USC 843(b)(3), and that this Section of the Code has been correctly interpreted by the Administrative Law Judge of the United States Department of Labor and by the defendants herein, it is by the Court this 18 day of August AD 1977,

ORDERED that plaintiffs' Motion for Summary Judgment be and the same is hereby denied, and it is further

ORDERED that the defendants' Motions for Summary Judgment be and the same are hereby granted, and it is further

ORDERED that defendants' Motions to Dismiss be and the same are hereby denied.

/s/ George L. Hart, Jr.
UNITED STATES DISTRICT JUDGE

Filed: Aug 18, 1977

APPENDIX E

U.S. Department of Labor
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Jesse Higgins, Paul Gower and William Gipson, Complainants, v. Old Ben Coal Company, Respondent. Case No. 76-BLA-633.

Final Findings of Fact, Conclusions of Law and Order

Complainants assert the Respondent violated Section 428 of the Federal Coal Mine Health and Safety Act,[1] which provides that "(no) operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis. . . ." This contention is in turn based upon the claim that the Respondent violated Section 203(b)(3),[2] which provides that any miner afflicted with pneumoconiosis, who exercises the option to transfer to another position in a less dusty work environment, "shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer."

Facts

The parties waived hearing and stipulated the following. Complainants became entitled to transfer to other jobs less likely to contribute to the advance of so-called "simple" pneumoconiosis pursuant to Section 203

[1]30 U.S.C. 938.
[2]30 U.S.C. 843(b)(1).

of the Act. Effective January 31, 1972, Complainants Jesse Higgins and Paul Gower transferred from the position of Machine Operator where they received the rate of $41.50 per day, to the position of Tracklayer, which was paid at the rate of $37.25 per day. Complainant William Gipson transferred on or about May 8, 1972 from the position of Repairman (daily rate $41.50) to Bottom Laborer (daily rate $37.25). Each continued to receive $41.50 per day, the rate applicable to his previous position immediately prior to the date of transfer.

On November 12, 1972, pursuant to the terms of the National Bituminous Coal Wage Agreement of 1971, the wage rates for the positions vacated by Complainants were raised to $45.75 per day and the rates for their new positions were raised to $40.00 per day. Complainants continued to receive the old rate applicable to their former positions immediately prior to their transfers.

On November 12, 1973, another contract wage increase occurred. The daily rates for the vacated positions advanced to $50.00 and those for the new positions to $42.75. Complainants received the new and higher rates of $42.75, and have continued to receive since that date the annual increases in the rates applicable under that contract and the succeeding contract to their new positions.[3] They have unsuccessfully re-

[3]The applicable contract wage rates and the amounts actually paid by Old Ben can be conveniently shown as follows:

Dates	*Machine Operator/ Repairman*	*Tracklayer Bottom/ Laborer*	*Amount Paid*	*Differences*
Transfer to 11/12/72	$41.50	$37.25	$41.50	—
11/12/72 to 11/11/73	45.75	40.00	41.50	4.25/day
11/12/73 to 11/11/74	50.00	42.75	42.75	7.25/day
12/06/74 to 12/05/75	55.00	47.03	47.03	7.97/day
12/06/75 to 12/05/76	57.20	48.91	48.91	8.29/day
12/06/76 to 12/05/77	58.92	50.38	50.38	8.54/day

quested that they be paid at the rates specified by the contract for the positions from which they transferred.

Complainants originally brought their claims of discrimination, based to Sections 110(b), 203 and 428 of the Act, to the Secretary of Interior. On July 16, 1974, the Board of Mine Operations Appeals dismissed their claim for want of jurisdiction. Complainants then requested relief from the Department of Labor pursuant to Section 428. The relief requested is an order that Respondent pay them at the contract rate for Machine Operators and Repairmen in the future, pay them back-pay plus 10 percent interest in the amounts by which it has failed to do so since November 12, 1972, and pay their costs and attorneys fees.

Discussion and Conclusions

As is obvious, the issue is purely one of statutory construction. Complainants argue that Section 203(b)(3) must be given an expansive reading in order to fully support the Act's purpose of encouraging miners to leave jobs which contribute to the advance of the disease. They contend that the "rate of pay received . . . immediately prior to . . . transfer" does not simply prohibit an immediate loss in amount of compensation, but rather, fixes into the future the rate applicable to the vacated job classification as the rate which applies to them in any new and lower-paid classification. Thus, they assert that, to the end of their coal-mining careers, they are entitled to compensation as if they had never transferred to lower-paying jobs. Clearly there exists no reading of the statute which could be more encouraging of transfers to cleaner work environments. And, as surely, any reading which accommodates an eventual loss of income will to some extent discourage miners from making choices favorable to their health.

There exists abundant authority for the proposition that a narrow reading which would tend to subvert the prime policy of protecting the health of miners is to be avoided. The legislative history states "that the Act is to be construed liberally when improved health or safety will result." House Leg. History at 1025; Senate Leg. Hist. at 1507. Courts have repeatedly noted, in cases arising under this Act, that a narrow or limited construction is to be eschewed in construing such safety or remedial legislation.[4] Respondent nevertheless argues that the Section at issue plainly reveals the Congressional intent: to ensure only that miners who opt for lower paying jobs will receive no less pay than they were receiving *immediately* before the transfer. And, of course, it contends that it is inappropriate to alter such plain words by reference to rules requiring liberal construction of remedial legislation.

The only legislative history brought to my attention concerning the purpose of Section 203(b)(3) states that it is "to insure" that miners who elect to transfer will "suffer no loss in compensation" by making them eligible to "receive the old or new rate of pay, whichever is greater". House Leg. Hist. at 49; Senate Leg. Hist. at 175. Complainants argue with some force, against

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[4]See *Phillips v. IBMA*, 500 F.2d 772, 782 (D.C. Cir., 1974); *Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir., 1974); *UMWA v. Kleppe*, 532 F.2d 1403, 1405-06, (D.C. Cir., 1976); *Rushton Mining v. Morton*, 520 F.2d 716, 720 (3rd Cir., 1975); *Reliable Coal Corp. v. Morton*, 478 F.2d 257, 262 (4th Cir. 1973); *Freeman Coal Mining Corp. v. IBMA*, 504 F.2d 741, 745 (7th Cir. 1974).

this backdrop, that the words "at not less than the regular rate of pay received . . . immediately prior to . . . transfer" must be expansively construed so as to avoid the result of placing afflicted miners in the dilemma of choosing between their wages and their health, thus chilling any inclination to opt for their health. They also argue, unconvincingly to me, that those words plainly mean that transferred miners shall be paid at the same rate of pay—e.g., the Machine Operator's or the Repairman's rate—at which they were paid prior to transfer, as the dollar amounts tied to that classification increase.

I read Section 203(b)(3) as a rather clear statement that a miner who chooses to transfer shall not be paid at a lesser rate (dollars per hour or day or ton) than he was receiving *immediately* prior to his transfer. Thus, "immediately prior" fixes the minimum hourly or daily rate he may be paid. Had it been Congress' purpose to assure that a miner continue to receive, into the indefinite future, the rate of pay associated with the job classification he chose to leave, it could simply have said that such a miner "shall be entitled to receive compensation for such work at the regular rate of pay for the job classification from which he transferred". Congress instead chose words which seem clearly to provide only that an afflicted miner may transfer without his wages being diminished. Complainants argument would be far more tenable if the word "immediately" were not in the paragraph. Its presence can be explained, in my judgment, only as a reference point from which to ascertain the lowest wage rate he may lawfully be paid. It seems otherwise unnecessary.

In short, I think Congress' purpose is too plainly stated to permit a more "liberal" reading by me. The rule requiring an expansive reading of remedial statutes is applicable where ambiguity is perceived. In that event, in choosing between two wholly permissible readings of the Act, it would be my duty to accept that reading which fosters the health of miners. Here, I cannot conscientiously conclude that the literal language of the Act is open to the construction urged by Complainants. If Congress in plain terms provided a limited incentive, it is not my function to enlarge it.

Order

Having found that Respondent has fulfilled the obligations imposed on it by Section 203(b)(3), it follows that no violation of Section 428 occurred. Complainants request for relief is therefore denied.[5]

/s/ John H. Fenton
JOHN H. FENTON
Administrative Law Judge

Dated: March 31, 1977
Washington, D.C.

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[5]As indicated in my proposed order of February 10, 1977, I have followed the proposed procedures for Black Lung anti-discrimination cases (Title 20 CFR Proposed Part 730—FR Doc. 75-15 Filed 1/12/75, Federal Register, Vol. 40, No. 2). This final order is issued after receipt of Complainants' Exceptions to the Proposed Order, filed on March 7, and a Response thereto filed on March 9, 1977.

APPENDIX F

Sections 203(a) & (b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§843 (a) & (b) (1976):

§ 843. Medical examinations—Chest roentgenogram; availability; periodic intervals; other tests; transmittal of results; advice of rights

(a) The operator of a coal mine shall cooperate with the Secretary of Health, Education, and Welfare in making available to each miner working in a coal mine the opportunity to have a chest roentgenogram within eighteen months after December 30, 1969, a second chest roentgenogram within three years thereafter, and subsequent chest roentgenograms at such intervals thereafter of not to exceed five years as the Secretary of Health, Education, and Welfare prescribes. Each worker who begins work in a coal mine for the first time shall be given, as soon as possible after commencement of his employment, and again three years later if he is still engaged in coal mining, a chest roentgenogram; and in the event the second such chest roentgenogram shows evidence of the development of pneumoconiosis the worker shall be given, two years later if he is still engaged in coal mining, an additional chest roentgenogram. All chest roentgenograms shall be given in accordance with specifications prescribed by the Secretary of Health, Education, and Welfare and shall be supplemented by such other tests as the Secretary of Health, Education, and Welfare deems necessary. The films shall be read and classified in a manner to be prescribed by the Secretary of Health, Education, and Welfare, and the results of each reading on each such person and of such test shall be submitted

to the Secretary and to the Secretary of Health, Education, and Welfare, and, at the request of the miner, to his physician. The Secretary shall also submit such results to such miner and advise him of his rights under this chapter related thereto. Such specifications, readings, classifications, and tests shall, to the greatest degree possible, be uniform for all coal mines and miners in such mines.

Evidence of pneumoconiosis; option to transfer; wages

(b) (1) On and after the operative date of this subchapter, any miner who, in the judgment of the Secretary of Health, Education, and Welfare based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 2.0 milligrams of dust per cubic meter of air.

(2) Effective three years after December 30, 1969, any miner who, in the judgment of the Secretary of Health, Education, and Welfare based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 1.0 milligrams of dust per cubic meter of air, or if such level is not attainable in such mine, to

a position in such mine where the concentration of respirable dust is the lowest attainable below 2.0 milligrams per cubic meter of air.

(3) Any miner so transferred shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer.